STATE OF MICHIGAN

IN THE SUPREME COURT

Bypass Appeal from the Oakland Circuit Court

ARTHUR Y. LISS and **BEVERLY LISS**,

Plaintiffs-Appellees,

-vs-

LEWISTON-RICHARDS, INC., a Michigan Corporation, and **JASON P. LEWISTON**

Defendants-Appellants,

and

LEWISTON-RICHARDS, INC.,

Counter-Plaintiff,

-vs-

ARTHUR Y. LISS and BEVERLY LISS,

Counter-Defendants.

_____/

Supreme Court No. 130064

Court of Appeals No. 266326

Oakland County Circuit Court No. 03-046587-CK

Honorable Fred M. Mester

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

BRIAN G. SHANNON (P23054)
MICHAEL F. JACOBSON (P47059)
Jaffe, Raitt, Heuer & Weiss, P.C.
27777 Franklin Road, Suite 2500
Southfield, MI 48086
(248) 351-3000
Co-Counsel for Defendants-Appellants

GARY D. REEVES (P35902)
MATTHEW T. JANE (P58396)
Bodman LLP
201 W. Big Beaver Road, Suite 500
Troy, MI 48084
(248) 743-6000
Co-Counsel for Defendants-Appellants

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

Other

JURISDICTIONAL STATEMENT

On October 18, 2005, the circuit order issued its "Order Regarding Court's Rulings on Summary Disposition Motions (Apx 43a). On November 7, 2005, Appellants filed their application for leave to appeal in the Court of Appeals (COA No. 266326). The Court of Appeals had jurisdiction over that application for leave under MCR 7.203(B)(1) and the application was timely filed. MCR 7.205(A).

Under MCR 7.302(C)(1)(b), a bypass application to this Court must be filed within 42 days after an application for leave is filed in the Court of Appeals. Appellants' application for bypass appeal was filed timely on December 8, 2005 and was granted by this Court in an order entered May 4, 2006 (Apx 113a). Accordingly, this Court has jurisdiction under MCR 7.301(A)(2).

STATEMENT OF QUESTION INVOLVED

The Michigan Consumer Protection Act does not apply to a "transaction or conduct specifically authorized under laws administered by a regulatory board or office acting under statutory authority . . . ." MCL 445.904(1)(a). The conduct of licensed residential builders is specifically authorized by and pervasively regulated by the Michigan Occupational Code, MCL 339.101 et seq. In this case, MCPA claims were asserted against a licensed residential builder for authorized, regulated conduct (building and selling a residence). The trial court, holding itself bound to follow *Hartman & Eichhorn Building Co, Inc v Dailey*, 266 Mich App 545 (2005), denied the builder's motion for summary disposition of the MCPA claims, based on the MCL 445.904(1)(a) exemption.

Should this Court hold that licensed residential builders are exempt from liability under the Michigan Consumer Protection Act when engaged in conduct authorized by and regulated by the Occupational Code?

Appellants say "yes."

The Oakland Circuit Court was not free to address the merits of this question, holding itself bound by the Court of Appeals' published decision in *Hartman*.

The Court of Appeals did not address this question, because this Court granted bypass review.

SUMMARY OF ARGUMENT

The Michigan Consumer Protection Act does not apply to a "transaction or conduct specifically authorized under laws administered by a regulatory board or office acting under statutory authority . . . . " MCL 445.904(1)(a)(the "Exemption"). This case involves the purely legal question whether the Exemption applies to licensed residential builders. The issue has a tangled history in the Michigan Court of Appeals – indeed, righting the status of the law on the issue may be a principal reason this Court granted leave to appeal in *Hartman* and in this case.

In *Smith v Globe Life Ins Co*, 460 Mich 446, 465 (1999), this Court held that the Exemption applies when the "general transaction" at issue is authorized by law, even though the legality of the defendant's conduct in the transaction might be in dispute. In *Forton v Laszar*, 239 Mich App 711, 715 (2000), *lv den* 464 Mich 969 (2001), the Court of Appeals held that MCPA claims may be maintained against residential builders because they engage in "trade or commerce." The *Forton* court did not consider the Exemption or *Smith*, and Laszar did not raise an argument based on the Exemption until his motion for rehearing on appeal, which was denied. This Court then denied leave to appeal in *Forton*. Justice Corrigan, concurring in the denial of leave, nevertheless cited *Smith* and stated: "Arguably, the logic of *Smith* would apply equally to defendant's sale of a residential home . . . ." 463 Mich 969, 970 (2001).

Later unpublished Court of Appeals' decisions recognized that *Forton* did not decide the Exemption issue, because it was not before the *Forton* court. But in *Hartman & Eichhorn Building Co, Inc v Dailey*, 266 Mich App 545, 552 (2005), a panel erroneously held that *Forton* had decided the Exemption issue. While the panel disagreed with that phantom decision, the panel declared itself bound to follow it under MCR 7.215(J). *Id.*

In the present case, Arthur and Beverly Liss sued Lewiston-Richards, Inc. and Jason Lewiston (collectively, "LRI") for an alleged breach of contract in connection with a $2.2 million home LRI built for them. The Lisses added MCPA claims to this lawsuit, and LRI sought summary disposition with respect to those claims, based on the Exemption. The Oakland Circuit Court (Hon. Fred M. Mester) had no choice but to deny that motion, based on *Hartman*, which the Court of Appeals had decided by the time LRI's motion was heard. LRI sought leave to appeal and, recognizing that a Court of Appeals panel also would be bound by *Hartman*, timely filed an application for bypass review to this Court.

This Court granted leave in *Hartman*, SC No. 129733, and in the present case, SC No. 130064 (Apx 113a). The Court of Appeals then dismissed LRI's application, as it was required to do when this Court took jurisdiction of the matter (Apx 115a). The question before this Court in both *Hartman* and *Liss* is an important one. Every year, many thousands of residential building projects are undertaken in Michigan.[1] Most of them are completed to the satisfaction of the homeowners who pay for them. When warranty claims or disagreements about final punch-list items arise, builders typically address these to the satisfaction of homeowners, and litigation is avoided. But litigation cannot always be avoided. Occasionally builders do not perform as promised, and occasionally homeowners do not complete their end of the bargain. The total number of projects is so large that even the tiny percentage that results in litigation is a considerable number of cases statewide over the course of a year. More often than not, these cases now include MCPA claims, even when the underlying claim is purely contractual, as most warranty claims are.

[1] There were 18,167 new residential permits in 2005 in southeast Michigan alone, according to the Southeast Michigan Council of Governments. SEMCOG reported 25,350 new residential permits in 2004. *See The Oakland Press*, page A-1, "Detroit leads in housing permits" (2/14/06).

There is presently widespread confusion concerning the proper scope of the Exemption, confusion that will only be worsened by an article recently published in the February 2006 Michigan Bar Journal. K. Breitmeyer, *Residential Builder Corporation Owners Now Liable Under the Michigan Consumer Protection Act*, 85 Mich Bar Journal, No. 2 at 28 (2006) (Apx 157a). This article asks the question "Can a Licensed Residential Builder be Held Liable for Violations of the MCPA?" and answers "*Yes, because of the precedent set forth in* Forton v Laszar." (*Id.* at 29, Apx 158a). Again, in *Forton*, the Court of Appeals never considered whether the Exemption applied to residential builders.

This is the very error that the panel majority fell into in *Hartman*. It is the error that required Judge Mester to deny LRI's motion in the present case. No panel of the Court of Appeals has ever freely held that the Exemption does not apply to residential builders. The logic of this Court's holding in *Smith* and the plain language of the Exemption requires the opposite conclusion. This Court should now hold once and for all that licensed residential builders are exempt from liability under the Michigan Consumer Protection Act when engaged in conduct authorized by and regulated by the Occupational Code.

STATEMENT OF FACTS

Background

This action arises out of the construction and sale of a $2.2 million home, which was being built as a "spec" home by LRI when it was purchased by the Lisses. Construction was still in progress when the Lisses signed an agreement of sale on December 22, 2000. The Lisses brought a breach of contract claim against LRI, the gist of which is for liquidated delay damages

when work was not completed by the scheduled date.[2] The Lisses, however, also pled a claim for damages and attorney fees under the Michigan Consumer Protection Act (Apx 57a-58a, Count IV, ¶¶ 33-35). This appeal concerns only the MCPA claim.

The Lisses, in conclusory terms, alleged "one or more" violations of six listed "unfair trade practices" prohibited by the MCPA, MCL 445.903(1)(Apx 57a, ¶34). The Lisses averred that they had incurred "damages in excess of $25,000.00, together with costs, interest and attorney fees, including those attorney fees awarded under the Act" (Apx 58a, ¶35). LRI denied these claims and stated, as a first affirmative defense, that "Plaintiffs cannot state a valid claim under the Michigan Consumer Protection Act because the transaction at issue is exempt from the provisions of that statute" (Apx 70a, Affirmative Defense #1).

Course of Proceedings

LRI brought a motion for partial summary disposition in August 2005, raising four arguments. LRI's third argument (Apx 74a) was that the Lisses could not maintain a MCPA action because of the Exemption. LRI cited *Smith, Winans v Paul and Marlene, Inc*, 2003 WL 21540437 (Mich App 2003) (Apx 123a), and Justice Corrigan's concurrence to the denial of leave in *Forton*, 463 Mich 969 (Apx 117a). The Lisses responded by citing *Forton*, *Hartman* and MCR 7.215(C) (Apx 78a, 80a).

In reply (Apx 83a-85a), LRI pointed out that *Forton* had not considered the Exemption, unlike *Winans* (Apx 123a) and *Shinney v Cambridge Homes, Inc*, 2005 WL 415492 (Mich App 2005) (Apx 133a). In both *Winans* and *Shinney*, the Court of Appeals held that the Exemption

[2] The Lisses' second amended complaint (Apx 49a) and LRI's counterclaim raise a variety of other claims and allegations concerning incomplete and warranty work, scope changes, added work, extensive delays and competing allegations about the cause of the delays. None of these claims and counterclaims are before this Court now.

insulated builders from MCPA claims, and that *Forton* was no obstacle to that holding, because it had not considered the Exemption issue. LRI argued the Lisses could not rely on *Hartman*, because that panel completely overlooked the absence of a decision on the Exemption in *Forton*.

On October 12, 2005, after the Court of Appeals denied reconsideration in *Hartman*, but before Hartman filed an application in this Court, Judge Mester heard argument on LRI's partial summary disposition motion and the Lisses' motion for summary disposition as to LRI's counterclaim (hearing transcript at Apx 89a). With respect to the MCPA issue, Judge Mester held that he was bound by MCR 7.215:

> As to whether or not the Michigan Consumer Protection Act applies to residential builders, in a recent case, that is of May 2005, the Court of Appeals held that although they questioned the wisdom of the Smith and Forton holdings that the M — that the Michigan Consumer Protection Act does apply, they were bound by MCR 7.215(J)(1) to apply Forton and hold the builder accountable under the Michigan Consumer Protection Act, and that's Hartman vs. Dailey 266 Mich App 545.
>
> This Court is also bound to follow settled precedent and must find that the Michigan Consumer Protection Act does apply to the Defendant. (Apx 100a)

An order to that effect was entered on October 18, 2005 (Apx 43a).

LRI filed an application for leave to appeal on November 7, within 21 days of the entry of Judge Mester's order (COA No. 266326) (Apx 1a is the docket). On December 8, 2005, LRI filed an application for bypass appeal under MCR 7.302(C)(1)(b). This Court granted leave in its order of May 4, 2006, and directed that this case and *Hartman* be argued and submitted to the Court together (Apx 113a).

ARGUMENT

LICENSED RESIDENTIAL BUILDERS ARE EXEMPT FROM LIABILITY UNDER THE MICHIGAN CONSUMER PROTECTION ACT FOR CONDUCT AUTHORIZED BY AND REGULATED BY THE OCCUPATIONAL CODE

A. Standard of review

This case presents a pure question of law. The legal issue arises under MCR 2.116(C)(8), and involves the application of statutory law, MCL 445.904(1)(a). This Court's review is de novo.

Summary disposition issues are legal questions, reviewed de novo by every court that considers them. *Dressel v Ameribank*, 468 Mich 557, 561 (2003). The interpretation and application of statutes is a legal question, reviewed de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32 (2003). This Court's approach to statutory analysis is very well known:

> This Court's primary task in construing a statute is to discern and give effect to the intent of the Legislature. The words contained in a statute provide us with the most reliable evidence of the Legislature's intent. In discerning legislative intent, this Court gives effect to every word, phrase, and clause in a statute. We must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme. *Shinholster v Annapolis Hospital*, 471 Mich 540, 548 (2004)(citations omitted).

B. The MCPA, by its own terms, does not apply to the conduct of residential builders like LRI

As a licensed builder of residential homes, LRI is extensively regulated under the Michigan Occupational Code, MCL 339.101 *et seq.*, and, therefore, is exempt from liability under the Michigan Consumer Protection Act. The MCPA protects consumers from unfair or deceptive trade practices where such conduct is ***not otherwise*** regulated by a state or federal body. Thus, the MCPA, by its own terms, does not apply to "[a] transaction or conduct

specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." MCL 445.904(1)(a)

1. Licensed residential builders are pervasively regulated by the Occupational Code

Michigan licenses and extensively regulates residential builders under the Occupational Code (the "Code"), MCL 339.101 *et seq*.[3] MCL 339.2402, creates a board of residential builders and maintenance and alteration contractors (the "Board") within the Department of Labor and Economic Growth, formerly known as the Department of Consumer and Industry Services (the "Department"). MCL 339.2402; MCL 339.307(1).[4] Among other things, the Board (1) promulgates rules that set minimum standards of practice, (2) interprets licensure and registration requirements, and (3) assesses penalties for violating the Code or rules. MCL 339.307—339.317. Subject to narrow exceptions, one must possess a residential builder's license to engage in the practice of residential building. MCL 339.601(1), MCL 339.2403.

Article 24 of the Code regulates the conduct of those to whom a builder's license has been issued and specifically prohibits "fraud, deceit, or dishonesty," "false advertising," and, generally, "[d]emonstrat[ing] a lack of good moral character." MCL 339.604. Moreover, Article 24 prohibits a wide range of other acts and omissions, including:

(a) Abandonment without legal excuse of a contract, construction project, or operation engaged in or undertaken by the licensee.

(b) Diversion of funds or property received for prosecution or completion of a specific construction project or operation, or for a specified purpose in the prosecution or completion of a construction project or operation, and the funds or property

---

[3] Most provisions dealing specifically with residential builders are found in Article 24 of the Code, MCL 339.2401 to MCL 339.2412.

[4] Under Executive Order 1996-2, MCL 445.2001, references in the Code to the Department of Commerce should be construed to mean the Bureau of Commercial Services within the Michigan Department of Consumer & Industry Services.

application or use for any other construction project or operation, obligation, or purposes.

(c) Failure to account for or remit money coming into the person's possession which belongs to others.

(d) A willful departure from or disregard of plans or specifications in a material respect and prejudicial to another, without consent of the owner or an authorized representative and without the consent of the person entitled to have the particular construction project or operation completed in accordance with the plans and specifications.

(e) A willful violation of the building laws of the state or of a political subdivision of the state.

* * *

(m) Poor workmanship or workmanship not meeting the standards of the custom or trade verified by a building code enforcement official. (MCL 339.2411(2).

The Code explicitly prohibits fraud, deceit, dishonesty, and falsity of all sorts, and regulates against poor workmanship or workmanship not meeting the standards of the custom or trade verified by a building code enforcement official, MCL 339.2411(2)—the precise kinds of conduct the Lisses allege constitutes a violation of the MCPA in this case.

Indeed, aggrieved purchasers of newly constructed homes have an arsenal of regulatory weapons to use against licensed residential homebuilders who they believe have violated the Code. They may—as the Lisses did in the present case (Apx 111a)—file a complaint with the Department, alleging that their builder violated any of the myriad regulations under Article 24. 1979, Admin R, 338.1151.

The Lisses' state administrative complaint is currently pending. The Department, among other things, may require a builder like LRI to appear for an investigative conference or to show cause why the Department should not revoke its license. 1979, Admin R, 388.1552 and 338.1553(3). If an investigation ensues, the Department may issue a formal complaint and serve it on the builder, after which the builder may (1) meet with the Department to negotiate a

settlement of the matter, (2) demonstrate compliance before a contested hearing, or (3) proceed to a contested hearing. MCL 339.508.

If a builder fails to negotiate a settlement, the matter proceeds to a formal administrative hearing. Even if a builder reaches a settlement or resolution with the homeowner, the Department may—and does—nonetheless proceed against the builder and take disciplinary action and impose sanctions. 1979, Admin R, 338.1553(3). These sanctions include, but are not limited to, license suspension, license revocation, civil fines and restitution. MCL 339.602. Thus, the regulators may, if appropriate, order the builder to fully compensate the homeowner for any damages arising from the builder's violation of the Code.

Arguably, in light of the lengthy list of potential violations, a homeowner has greater rights under the Code than under the common law. Moreover, the Department does not charge the homeowner anything for prosecuting Code violations on the homeowner's behalf. The Legislature was aware of this "regulatory reality" when it exempted regulated activities from the purview of the MCPA.

2. In *Smith* this Court held that whether conduct is exempt is determined by the general transaction involved, not the specific conduct alleged

Several years ago, this Court clarified the scope of the MCPA's Exemption in *Smith v Globe Life Ins Co*, 460 Mich 446 (1999). This Court held that the Exemption applies when the "general transaction" at issue is authorized by law, even though the legality of the defendant's conduct in performing the transaction might be in dispute. *Id.* at 465.

> [T]he relevant inquiry is ***not*** whether the specific misconduct alleged by the plaintiffs is "specifically authorized." Rather, it is whether the general transaction is specifically authorized by law, ***regardless of whether the specific misconduct alleged is prohibited***. *Id.* (emphasis added).

Here, the general transaction at issue is LRI's construction and sale of a home and it is undisputed that the general transaction involved is authorized by the Code.

In *Smith*, plaintiff alleged Globe Life violated the MCPA by misrepresenting a policy of credit life insurance plaintiff's decedent had purchased. 460 Mich at 450-451. In rejecting Globe's invocation of the Exemption, the Court of Appeals held that the Legislature did not intend to exempt illegal conduct from coverage under the MCPA. *Id.* 453. This Court reversed, however, concluding, "when the Legislature said that transactions or conduct specifically authorized by law are exempt from the MCPA, ***it intended to include conduct the legality of which is in dispute***." *Id.* 465 (emphasis added).

In reaching that result, this Court contrasted the situation in *Attorney General v Diamond Mortgage Co*, 414 Mich 603 (1982), because there the defendant was a real estate broker, writing mortgages was the conduct plaintiff complained about, and writing mortgages was ***not*** specifically authorized under the real estate broker's license. 460 Mich at 464.

Following *Smith*, the Court of Appeals consistently has recognized that the relevant inquiry concerns the authorized nature of the "general transaction," rather than the alleged "specific misconduct." *See, e.g., Kraft v Detroit Entertainment, LLC*, 261 Mich App 534 (2004) (where Michigan Gaming Control Board extensively regulated general conduct—operation of slot machines—MCPA Exemption applied to claim concerning false advertising and promotion of slot machines); *Newton v Bank One*, 262 Mich App 434 (2004) (MCPA Exemption applied to residential mortgage loans made by federal savings bank because it was specifically authorized to make such loans under statutory authority of the United States and the Michigan Savings Bank Act); *Mansoori v Birmingham Imports, Inc*, 2006 WL 794893 (Mich App 2006) (Apx 143a) (MCPA Exemption applied to automobile lease financing transactions because bank regulated by

the Office of the Comptroller of Currency under the National Bank Act); *Timmons v Devoll*, 2004 WL 345495 (Mich App), *lv den* 471 Mich 906 (2004) (Apx 145a) (MCPA Exemption applied to real estate agent whose conduct was regulated under the Michigan Occupational Code); *Love v Ciccarelli*, 2004 WL 981164 (Mich App 2004) (Apx 151a) (MCPA Exemption applied to licensed realtor whose conduct was regulated under the Michigan Occupational Code).[5]

Thus, here the relevant inquiry is not whether the Code authorized the allegedly improper or inadequate conduct of LRI. The inquiry is whether the Code specifically authorized construction and sale of the Lisses' new home. It clearly did.

3. In *Forton*, the Court of Appeals did not decide whether the Exemption applies to licensed residential builders

Forton v Laszar, 239 Mich App 711 (2000), *lv den* 463 Mich 969 (2001) (Apx 117a), is noteworthy for one reason only, and that is the defendant builder's failure to even mention the

---

[5] Other courts also have applied the Exemption in similar regulated industries, such as the security sales industry. In *Caproni v Prudential Securities, Inc*, 15 F3d 614 (CA 6 1994), *abrogated on other grounds sub nom Rotella v Wood*, 528 US 49; 120 S Ct 1075; 145 L Ed 2d 1047 (2000), the Sixth Circuit held that the Exemption encompasses securities transactions because of the elaborate regulation of such transactions by the State of Michigan. *See also Mercer v Jaffe, Snider, Raitt and Heuer*, 750 F Supp 74 (WD Mich 1990).

Elsewhere, similar statutes are similarly construed. *See, e.g., Averill v Cox*, 145 NH 328; 761 A2d 1083 (2000) (New Hampshire Supreme Court held that the overall governmental regulation of a business activity entitles a defendant to claim the protection of the exemption for regulated conduct); *State v Piedmont Funding Corp*, 119 RI 695; 382 A2d 819, 821-822 (1978) (Rhode Island Supreme Court construed a statutory exemption substantially similar to that found in the MCPA to afford blanket exemption to participants in regulated activities, concluding that plain statutory language exempted from the act all those activities and businesses subject to monitoring by state or federal regulatory bodies or officers). As consumer protection statutes are not uniform, decisions from other states are based on language different from the language of the Michigan statute and on different regulatory schemes. *See e.g.*, NJ Stat Ann 56:8-140(a) (New Jersey Consumer Fraud Act explicitly exempts persons required to register under the New Home Warranty and Builders' Registration Act).

Exemption until after the Court of Appeals had decided the case.[6] In *Forton*, plaintiffs sued a residential builder for various allegedly deceptive business practices. The builder questioned whether a residential builder could be sued under the MCPA, apparently by arguing he did not fit within the MCPA's definition of "trade or commerce." 239 Mich App at 714-715. The Court disagreed, concluding that the definition of "trade or commerce" in MCL 445.903(1) was broad enough to encompass residential builders. 239 Mich App 715. But no one asked the Court to take the next step and consider whether the Exemption precluded application of the MCPA to licensed builders. The builder failed to raise either the Exemption or this Court's holding in *Smith*. Not surprisingly, the Court of Appeals did not address an issue the defendant had neither raised in the trial court nor on appeal.

After the Court of Appeals affirmed, the defendant belatedly tried to raise the Exemption issue via a motion for reconsideration, which was denied without explanation. Concurring in the denial of the application for leave to appeal to this Court that followed, Justice Corrigan pointed out that the builder failed to argue MCL 445.904(1)(a) and *Smith*:

> In a motion for rehearing in the Court of Appeals, defendant argued *for the first time* [emphasis by the Court] that his sale of the house to plaintiffs was exempted from MCPA regulation under subsection 4(1)(a) of the MCPA. The Court of Appeals denied defendant's motion for rehearing without providing any specific explanation. . . .
>
> . . . . Defendant now contends that his sale to plaintiffs comes within [the regulated activity] exemption because he is a residential builder licensed and regulated under the Michigan Occupational Code. . . . In *Smith, supra*, we explained that the words "transaction or conduct" in subsection 4(1)(a) referred to the general transaction at issue rather than the specific misconduct alleged. We then held that subsection 4(1)(a) exempted the sale of credit life insurance from the MCPA, because (1) the sale of credit life insurance was specifically authorized under the

[6] *Smith* was decided by the Supreme Court on July 13, 1999, five months before *Forton* went to a panel on December 15. There is no mention of *Smith* or *Smith*'s "general transaction" test in the *Forton* opinion. It does not appear that either side relied on *Smith* as authority before or at oral argument of *Forton*.

> state laws governing the sale of insurance, and (2) those laws were administered by the Insurance Commissioner. Arguably, ***the logic of Smith would apply equally to defendant's sale of a residential home***, because (1) portions of the Occupational Code regulate the conduct of residential builders, and (2) residential builders are regulated by the Residential Builders and Maintenance and Alteration Contractors' Board.
>
> ***Although defendant's legal argument appears to have substantive merit, it can be of no avail to defendant, who failed to raise the issue in a timely fashion.*** Subsection 4(3) of the MCPA provides that "[t]he burden of proving an exemption from this act is upon the person claiming the exemption." Defendant clearly failed to meet his burden by claiming the exemption for the first time in a motion for rehearing in the Court of Appeals. 463 Mich 969 (Apx 117a-118a) (emphasis added).

Accordingly, *Forton* is not precedent on the issue whether the Exemption applies to residential builders. It is merely precedent for the proposition that residential builders are engaged in trade or commerce as defined in MCL 445.903(1).

4. Seven of the eight Court of Appeals judges who have considered the issue have concluded that licensed residential builders are exempt from MCPA claims

Judges Schuette, Sawyer, O'Connell, Jansen, Donofrio, Kelly, Saad, and Smolenski of the Court of Appeals all had occasion in 2003-2005 to consider whether the Exemption applies to residential builders. Seven of these eight judges, sitting on three different panels (Judge Sawyer sat on two of the panels), have agreed that licensed residential builders are exempt from MCPA claims when engaged in transactions authorized and regulated by the Occupational Code. Judge Jansen disagreed in part, and that disagreement is analyzed below. And, of course, the different judges on the *Forton* panel never reached this issue at all. Justice Corrigan, in the statement she made when leave to appeal was denied in *Forton*, strongly suggested that she too would hold that MCL 445.904(1)(a) exempts residential builders from MCPA claims.

The first post-*Forton* case to consider the issue was *Winans* in 2003 (Apx 123a). Plaintiffs contracted with defendant, a licensed residential builder, to build a house. After

numerous flooding problems, plaintiffs sued under the MCPA, alleging that defendant failed to make repairs and made fraudulent misrepresentations (Apx 123a, at *1). Reversing the trial court's denial of a directed verdict on the MCPA claim, the Court of Appeals (Judges Sawyer and Donofrio) agreed with defendant that plaintiffs' complaints all concerned the general transaction of building their home, a regulated activity, and, therefore, came within the Exemption (Apx 125a, at *3). The panel was well aware of *Forton*, and in fact quoted at length Justice Corrigan's concurrence in the denial of leave in that case (*id.*). Because *Forton* did not decide the Exemption issue, the *Winans* panel held that the residential builder was exempt from the MCPA claim.

Judge Jansen dissented in *Winans*, reading *Smith* far too narrowly and *Diamond Mortgage* too broadly. She wrote that "[a] licensed builder is not specifically authorized to make misrepresentations to consumers" (Apx 126a, at *4), which misses the very point of *Smith*'s general transaction test. She concluded that complaints about a residential home built by a licensed residential builder were analogous to the complaints in *Diamond Mortgage* about a mortgage written by a real estate broker (Apx 128a, at *7). This is incorrect, because a residential builder is specifically authorized to build residences while a real estate broker is not specifically authorized to write mortgages.[7] Significantly, in 2004, other panels of the Court of Appeals found real estate brokers exempt from MCPA claims when engaged in the activities

[7] It is unclear whether Judge Jansen adheres to the view she expressed in her *Winans* dissent. Less than a year later, in *Love, supra* (Apx 151a), Judge Jansen agreed with the majority that the Exemption applied to a licensed realtor whose conduct was regulated by the Michigan Occupational Code. Residential builders and realtors are governed by very comparable and immediately adjacent provisions of the Occupational Code in Article 24 (MCL 339.2401 et seq) and Article 25 (MCL 339.2501 *et seq*).

authorized by their licenses (*Timmons* and *Love*, both *supra* at 11) and found banks exempt for authorized mortgage writing activity (*Newton*, *supra* at 10) and automobile lease financing transactions (*Mansoori, supra* at 10).

In 2005, in *Shinney* (Apx 133a), three different judges (Judges Kelly, Saad, and Smolenski) reached the same conclusion as the *Winans* majority. The plaintiffs in *Shinney* alleged violation of the MCPA by the builder of a condominium. Relying on *Smith*, the Court of Appeals denied plaintiffs' claim for attorney fees under the MCPA because defendant, as a licensed residential builder, was engaged in a general transaction specifically authorized by the Michigan Occupational Code and thus was exempt from the MCPA under MCL 445.904(1)(a)(Apx 134a-135a, at *2-*3). The *Shinney* panel noted specifically that *Forton* had held that residential builders were subject to MCPA claims because of the broad definition of "trade or commerce," but noted also that "this Court [in *Forton*] did not address the application of MCL 445.904(1)(a) to a residential builder" (Apx 134a, at *2).

Hartman was decided three months after *Shinney*. Unlike the *Shinney* panel, the *Hartman* panel failed to recognize what *Forton* did and did not address. Judge O'Connell, writing for himself and Judge Schuette, after stating that the MCPA should not apply to builders because they were regulated by the Occupational Code, made this flatly incorrect statement:

> Nevertheless, our decision in *Forton v Laszar* has already applied *Smith* to building contractors and found that the act of building a house does not fit within the MCPA's exemption provision. 266 Mich App at 547 (Apx 139a).

Again, *Forton* did nothing of the kind. *Forton* never mentioned *Smith* (decided just a few months earlier), much less "applied" it, and never mentioned "the MCPA's exemption provision." The third judge on the *Hartman* panel, Judge Sawyer (who was on the *Winans* panel too), dissented on the MCPA issue. He disagreed for two reasons, one of which was that he saw no need to discuss whether *Forton* was correctly decided, since the trial court had not based its

decision on that ground. 266 Mich App at 553 (Apx 141a). In a footnote, he added that he agreed with the majority "that *Winans* presents the better view" of the issue whether the Exemption exempts residential builders from MCPA claims. *Id.* 553 n.1 (Apx 141a). Judge Sawyer, however, did not take issue with the majority on its misstatement of what *Forton* held, or its misstatement that *Forton* had applied *Smith*.[8]

Much of the *Hartman* opinion is spent distinguishing between Jeffrey Hartman and his company, Hartman & Eichhorn Building Co, Inc. ("HEBC"). HEBC, a licensed residential builder, sued homeowners (the Daileys) for breach of contract and unjust enrichment after they withheld final payment. 266 Mich App at 548. The Daileys counterclaimed with various theories, alleging fraud and MCPA violations, and added Hartman individually to the lawsuit. *Id.* Hartman argued in the trial court that the Daileys' contract was with HEBC, and he could not be liable individually. The trial court agreed, and the Court of Appeals reversed, holding in part

---

[8] Arguably, three other judges of the Court of Appeals could be added to the list of those who would agree with LRI's position. *Gleason v Nexes Realty, Inc*, 2005 WL 3304117 (Mich App 2005) (Apx 155a), is a realtor case, not a residential builder case, but, as noted above, comparable sections of the Occupational Code regulate builders and realtors. In *Gleason*, plaintiffs claimed defendants failed to convey their purchase offer to certain homeowners. The Court of Appeals identified the general transaction as "the presentation of a potential buyer's offer to the seller by the seller's agent." Finding this activity to be "specifically authorized," the court relied upon *Smith* to hold that the transaction was exempt from the MCPA under MCL 445.904(1)(a) (Apx 156a). The *Gleason* panel comprised Judges Bandstra, Neff, and Markey. In other realtor cases, the *Love* panel included Judges Donofrio (who also sat on *Winans*) and Judge Griffin, in addition to Judge Jansen. The panel in *Timmons* comprised Judges Sawyer (who sat on both *Hartman* and *Winans*), Bandstra (*Gleason*), and Saad (*Shinney*).

Again, the judges who have considered whether the Exemption exempts licensed residential builders are: Judges Schuette, Sawyer, O'Connell, Donofrio, Kelly, Saad, Smolenski, and Jansen. Adding in the four Court of Appeals judges who have decided that realtors are exempt from MCPA clalims but have not addressed the issue as to builders (that is, Judges Bandstra, Neff, Markey, and Griffin), the total count is 11 out of 12 judges in agreement with LRI's position – or 12 out of 12 if Judge Jansen no longer adheres to her *Winans* views. Either way, the level of agreement in the Court of Appeals is striking.

that Hartman could be liable individually on the fraud claims. *Id.* 549-550. As to the MCPA, a majority of the *Hartman* panel thought there could be individual liability (*id.* 551-552), although all three judges agreed that Hartman and HEBC should be exempt under MCL 445.904(1)(a), and would have so held but for the presumed (by Judges O'Connell and Schuette) conflict with *Forton*. *Id.* 547, 552-553. Judge Sawyer thought there should be no MCPA claim against Hartman individually, and, as noted earlier, would not have declared a conflict with *Forton* as the majority did. *Id.* 553.

The Court of Appeals, acting as a whole, declined to convene a conflict panel to resolve the disagreement between *Hartman* and *Forton*, for the reason that the conflict was not outcome-determinative. Some of the judges who voted not to convene a conflict panel may have done so because the *Hartman* panel's decision that the Daileys were entitled to pursue their fraud claims against Hartman individually meant that the panel's decision to remand would have remained in effect even if the MCPA issue were resolved in Hartman's favor. Alternatively, some of the judges who voted not to convene a conflict panel may have done so because they understood that *Forton* never addressed the question whether MCL 445.904(1)(a) exempts licensed residential builders from MCPA claims, and therefore there was no real conflict. Whatever the reasoning behind individual votes, the net effect is that *Hartman*'s erroneous interpretation of *Forton* is now binding precedent in Michigan under the rule of *stare decisis*. MCR 7.215(C)(2) and (J)(1).

C. This Court should hold that licensed residential builders are exempt from MCPA claims when engaged in the general business of their regulated industry

Very simply, *Forton* is not the problem; *Hartman* is. As *Winans* and *Shinney* show, before *Hartman* the Court of Appeals reached the correct conclusion and applied the Exemption to licensed residential builders, notwithstanding *Forton*. It would be better, of course, not to

have *Forton* potentially confusing the bench and bar, but any shortcomings in *Forton* were the fault of the litigants in that case, not the Court of Appeals. All that changed when the *Hartman* majority declared that *Forton* "found that the act of building a house does not fit within the MCPA's exemption provision." 266 Mich App at 547 (Apx 139a). With that one sentence, the *Hartman* majority created a holding that never was—and, ironically, a holding all the *Hartman* panelists disagreed with—and turned it into binding, state-wide law, frustrating the purpose of the MCPA by making residential builders, a pervasively regulated industry, subject to MCPA claims brought by every dissatisfied homeowner who wants to "up the ante" with a potential award of actual attorney fees.

Now that this Court has the issue squarely before it in *Hartman* and in the present case, it should take the action Justice Corrigan alluded to in her *Forton* statement (117a-118a). The present case, a single-issue appeal, provides a perfect opportunity for the Court to clean up the *Hartman* problem in short order. This Court should hold that *Winans* and *Shinney* correctly apply the Exemption to the residential building industry, and overrule *Hartman*, thus finally resolving a jurisprudentially significant question that arises with regularity in Michigan's circuit courts. Properly understood, the issue has been settled since this Court decided *Smith* in 1999, months before *Forton*. As this brief has shown, application of the general transaction test to a variety of regulated industries since 1999 has made it ever clearer which defendants are, and which are not, subject to MCPA claims. Licensed residential builders, when engaged in their pervasively regulated businesses, are not subject to MCPA claims.

Winans and *Shinney* directly address the application of the regulated activities exemption in factual contexts that are substantively identical to the case at bar. Because of the Court of Appeals' "first out" rule, MCR 7.215(J)(1), the *Winans* and *Shinney* panels could not have

rendered the decisions they did if *Forton* actually said what *Hartman* said it said. But the *Winans* and *Shinney* panels recognized the limits of *Forton*. Even in *Hartman* itself, Judge O'Connell tried to undo the result of his initial opinion by voting to grant reconsideration and decrying the waste of judicial resources that will continue so long as *Hartman* remains in effect:

> I believe it would be a waste of judicial resources to deny this motion for reconsideration because any recovery below based on MCPA grounds will undoubtedly face another more successful challenge in this Court.
>
> On reconsideration and in light of our Court's collective finding that deviation from our holding in *Forton* . . . is not outcome-determinative, I would find, for the reasons stated in our original opinion, that the MCPA does not apply to residential builders or alteration contractors . . . . (Apx 137a-1)

Unfortunately, neither Judge Sawyer (who originally opposed declaring a conflict with *Forton*) nor Judge Schuette joined with Judge O'Connell.[9] Thus, the *Hartman* problem remains unresolved until this Court rules.

---

[9] The order denying reconsideration (Apx 137a-1) ends by stating:

> Judges Schuette and Sawyer, while voting to DENY the motion for reconsideration, agree that the Michigan Consumer Protection Act (MCPA) does not apply to building contractors and that the resolution of this issue is best determined on appeal to the Michigan Supreme Court or by a case that was not subject to a conflict panel pursuant to MCR 7.215.

Judges Schuette and Sawyer do not explain what they mean by a case "not subject to a conflict panel pursuant to MCR 7.215." Probably they mean that they felt somehow constrained not to grant reconsideration after the Court as a whole had voted not to convene a conflict panel in this case. But that misapprehends the basic structure of MCR 7.215(J), which contemplates that panel motions will be filed *after* the whole Court declines to convene a conflict panel. *See* MCR 7.215(J)(7). And if Judges Schuette and Sawyer were thinking that panels in later cases could simply disregard *Hartman* and rule as the Court did in the unpublished decisions of *Winans* and *Shinney*, they are forgetting the effect of MCR 7.215(C)(2), which binds courts other than the Supreme Court to follow *Hartman*'s incorrect holding that *Forton* "found that the act of building a house does not fit within the MCPA's exemption provision." 266 Mich App at 547 (Apx 139a).

CONCLUSION AND RELIEF REQUESTED

In deciding *Hartman* and the present case, this Court should take the opportunity provided to end the confusion that began with *Forton* and peaked with *Hartman*. The MCPA's regulated industry exemption, MCL 445.904(1)(a), applies to licensed residential builders engaged in their regulated business. Except for the specific application to the residential building industry, the necessary principles have been settled since this Court's decision in *Smith*. Many judges of the Court of Appeals have recognized this. The *Hartman* panelists simply misconstrued *Forton* and tied their own hands, making this Court's intervention necessary.

In the present case, the Lisses have all the recourse to which the law entitles them. They have their circuit court lawsuit for breach of contract and any other common law remedy they wish to allege. They have the administrative proceeding they initiated by filing a complaint with the state agency that oversees LRI's compliance with the Occupational Code. The plain meaning of MCL 445.904(1)(a) is that the Lisses are not also entitled to assert claims under the Michigan Consumer Protection Act. This Court should so hold, thereby eliminating the confusion and doubt that have plagued residential builders in Michigan since 2000, when *Forton* clouded the waters that this Court had tried to clear in *Smith* a year earlier.

Respectfully submitted,

BRIAN G. SHANNON (P23054)
MICHAEL F. JACOBSON (P47059)
Jaffe, Raitt, Heuer & Weiss, P.C.
27777 Franklin Road, Suite 2500
Southfield, MI 48086
(248) 351-3000
Co-Counsel for Defendants-Appellants

GARY D. REEVES (P35902)
MATTHEW T. JANE (P58396)
Bodman LLP
201 W. Big Beaver Road, Suite 500
Troy, MI 48084
(248) 743-6000
Co-Counsel for Defendants-Appellants

Dated: July 19, 2006

1264475.01